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17 **UNITED STATES DISTRICT COURT**

18 **CENTRAL DISTRICT OF CALIFORNIA**

19 SHOSH YONAY, an individual, and  
20 YUVAL YONAY, an individual,

21 Plaintiffs,

22 v.

23 PARAMOUNT PICTURES  
24 CORPORATION, a Delaware  
25 corporation,

26 Defendant.

Case No. 2:22-CV-3846-PA  
Assigned to: Hon. Percy Anderson

**JOINT RULE 26(F) REPORT**

**Hearing Date:** January 9, 2023

**Hearing Time:** 10:30 A.M.

**Ctrm:** 9A

1 Pursuant to Federal Rules of Civil Procedure 16 and 26(f), and this  
2 Court's Order (Dkt. 26), Plaintiffs Shosh Yonay and Yuval Yonay ("Plaintiffs")  
3 and Defendant Paramount Pictures Corporation ("Paramount Pictures") submit  
4 the following Joint Rule 26(f) Report.

5 **A. Synopsis of Principal Issues**

6 This is an action alleging copyright infringement of Ehud Yonay's  
7 ("Yonay") work "Top Guns" ("Work") by Paramount Pictures' 2022 film, *Top*  
8 *Gun: Maverick* ("*Maverick*") and for Paramount Pictures' alleged breach of its  
9 1983 agreement ("Agreement") with Yonay for film and other rights to the  
10 Work. On January 23, 2018, Plaintiffs allegedly exercised their termination  
11 rights under the 1976 Copyright Act, 17 U.S.C. § 203(a), and claim to have  
12 recovered, on January 24, 2020, all rights under U.S. copyright to the Work that  
13 had previously been assigned to Paramount Pictures. Plaintiffs allege that  
14 Paramount Pictures produced and distributed *Maverick* without licensing the  
15 Work, and did not credit Yonay or the Work on *Maverick*. Plaintiffs contend  
16 that Paramount Pictures thereby infringed the Work's copyright and that  
17 Paramount Pictures' failure to credit Yonay on *Maverick* breached the  
18 Agreement. Paramount Pictures denies all liability.

19 **B. Initial Disclosures**

20 The parties stipulate to exchange the initial disclosures as required by  
21 Rule 26(a) on or before January 20, 2023. The disclosures shall contain the  
22 information identified in Rule 26(a)(1) and shall be supplemented as required by  
23 Rule 26(e)(1). The parties do not seek any changes to the disclosure  
24 requirements under Rule 26(a), apart from their timing.

25 **C. Proposed Schedule**

26 The Parties have been unable to agree on a proposed schedule and thus  
27 separately set forth their respective proposals below. Regardless of which  
28 schedule is so-ordered by the Court, the Parties agree that any party, individually

1 or collectively, may seek leave of the Court to change any of the so-ordered  
 2 dates for good cause.

3 **Plaintiffs’ Proposal.**

4 As discussed further in Section H(c) *infra*, Plaintiffs propose a non-  
 5 bifurcated schedule with liability and damages-related discovery taken together  
 6 as follows:

- 7 1. June 9, 2023: Deadline to amend pleadings and/or add new  
 8 parties.
- 9 2. November 3, 2023: Expert report deadline.
- 10 3. November 22, 2023: Rebuttal expert report deadline.
- 11 4. December 22, 2023: Discovery cut off (including written  
 12 discovery and fact and excerpt depositions).
- 13 5. February 2, 2024: Last day to file dispositive motions.
- 14 6. March 11, 2024: Last day to file motions in limine.
- 15 7. April 8, 2024: Final pretrial conference
- 16 8. May 6, 2024: Trial (one-week).

17 **Paramount Pictures’ Proposal.**

18 Paramount Pictures respectfully requests that discovery be bifurcated as  
 19 per the schedule below, with damages-related discovery deferred until after the  
 20 Court adjudicates a motion for summary judgment on liability on Plaintiffs’  
 21 copyright infringement claim. “Courts frequently bifurcate trademark or  
 22 copyright infringement cases when liability is a threshold issue.” *Wixen Music*  
 23 *Publ’g, Inc. v. Triller, Inc.*, 2021 WL 4816627, at \*3 (C.D. Cal. Aug. 11,  
 24 2021)(collecting cases). Here, as the Court is aware from Paramount Pictures’  
 25 motion to dismiss, liability is very much a threshold issue given that Plaintiffs’  
 26 underlying work is a non-fiction article. *See, e.g., Feist Publ’ns, Inc. v. Rural*  
 27 *Tel. Serv. Co.*, 499 U.S. 340, 344–45 (1991) (“The most fundamental axiom of  
 28 copyright law is that ‘no author may copyright ... the facts he narrates.’”);

1 *Corbello v. Valli*, 974 F.3d 965, 971 (9th Cir. 2020), *cert. denied*, 141 S. Ct.  
2 2856 (2021) (factual information “may not ... form the basis for a copyright  
3 claim”).

4 Proceeding in this manner would be the most efficient and economical  
5 way to proceed, especially given that damages-related discovery does not  
6 overlap with the liability-related discovery. *See, e.g., Bassil v. Webster*, 2021  
7 WL 1235258, at \*2 (C.D. Cal. Jan. 15, 2021) (granting motion in copyright  
8 infringement action to bifurcate liability and damages discovery, noting the lack  
9 of overlap between liability and damages discovery in support). Further,  
10 bifurcation is appropriate due to the potentially high degree of complexity and  
11 associated costs of damages discovery as well as the potential for disputes  
12 regarding damages discovery. *See id.* at \*2 (explaining that damages discovery  
13 was likely to involve a high degree of complexity and disputes requiring court  
14 intervention and citing *Nimmer* for the proposition that “[o]ne of the most  
15 difficult problems in the computation of profits for which the defendant is liable  
16 arises when the infringing work inextricably intermingles noninfringing material  
17 with plaintiff’s protectable material”). Even further still, Paramount Pictures  
18 notes that—even with bifurcation—Paramount Pictures’ schedule is *quicker* than  
19 Plaintiffs’ and thus Plaintiffs cannot make a claim of prejudice. *See id.* at \*3  
20 (rejecting claim of prejudice by party opposing bifurcation request because that  
21 party’s schedule was not quicker than that proposed by party seeking  
22 bifurcation).

23 Bifurcation is warranted in this case for an additional practical reason –  
24 *Maverick* was released theatrically only seven months ago, and recently returned  
25 to theaters for a limited re-release ahead of its debut on the Paramount Plus  
26 streaming service. *See* Rebecca Rubin, ‘*Top Gun: Maverick*’ Returns to  
27 Theaters for Limited Re-Release, VARIETY (Nov. 29, 2022), available at  
28 variety.com. Accordingly, the damages-related facts to be “discovered” are very

much still changing. Bifurcation would therefore schedule damages discovery for late 2023, when *Maverick*'s revenue is expected to change less meaningfully month-to-month, and be more efficient because any designated experts would not need to amend their opinions based on meaningfully revised revenue figures.

Paramount Pictures thus proposes the following schedule:

1. June 26, 2023: Liability expert report deadline.
2. July 17, 2023: Liability rebuttal expert report deadline.
3. July 31, 2023: Liability discovery cutoff (including written discovery and fact and excerpt depositions).
4. August 7, 2023: Deadline to file dispositive motion.
5. September 18, 2023: Hearing deadline for dispositive motion on liability.
6. November 20, 2023: Damages expert report deadline.
7. December 11, 2023: Damages rebuttal report deadline.
8. January 8, 2024: Damages discovery cutoff (including written discovery and depositions) and last day to file motions.
9. February 12, 2024: Final pre-trial conference and last day to hear motions.
10. March 11, 2024: Trial (one week)

In the event that the Court declines to bifurcate liability and damages discovery based on this Rule 26(f) report, Paramount Pictures respectfully reserves the right to formally move on this issue.<sup>1</sup>

#### **D. Proposed Discovery Plan**

The parties are to conduct discovery in accordance with the Federal Rules of Civil Procedure and the Local Rules of the Central District of California. The

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<sup>11</sup> Further, in the event that the Court does not bifurcate discovery based on this report, Paramount Pictures is amenable to Plaintiffs' proposed schedule, subject to its reservation of rights.

1 parties intend to take necessary discovery into the claims and defenses raised in  
2 this action. The parties further agree that this paragraph is without prejudice to  
3 or limitation of either party's ability to take relevant and appropriate discovery  
4 as well as either party's ability to oppose any requested discovery, and all parties  
5 reserve all rights with respect thereto.

6 **E. Issues of Disclosure, Discovery, or Preservation of ESI**

7 The parties agree to meet and confer to negotiate a protocol for the  
8 production of any Electronically Stored Information ("ESI"), to the extent the  
9 need for ESI arises.

10 **F. Privilege and Protective Orders**

11 The parties agree to enter into an appropriate standard stipulated  
12 protective order for the exchange of confidential information. The parties agree  
13 that attorney-client communications and/or documents protected by the work  
14 product doctrine created on or after June 6, 2022 do not need to be included on a  
15 privilege log.

16 **G. Proposed Limitations on Discovery**

17 While reserving all rights, the parties do not currently request any changes  
18 to the limitations on discovery imposed under the Federal Rules of Civil  
19 Procedure or the Central District Local Rules.

20 **H. Additional Items**

21 **a. Settlement**

22 The parties have not engaged in settlement discussion, but agree to ADR  
23 Procedure No. 2 (Court Mediation Panel).

24 **b. Additional Parties**

25 At this stage in the litigation, the parties do not anticipate adding any  
26 additional parties.

1           **c. Severance, Bifurcation, and Ordering of Proof**  
 2           **Plaintiffs’ Proposal.**

3           Plaintiffs propose a non-bifurcated schedule with liability and damages-  
 4 related discovery taken together so as to most efficiently litigate this case. As a  
 5 preliminary matter, bifurcation of liability and damages discovery is  
 6 inappropriate here because they are interwoven issues. Liability on Plaintiffs’  
 7 claim for breach of contract, for example, *necessitates proof of damages*. See  
 8 e.g., *Richman v. Hartley* 224 Cal.App.4th 1182, 1186 (2014) (“To prevail on a  
 9 cause of action for breach of contract, the plaintiff must prove . . . damage to the  
 10 plaintiff.”). Bifurcation would thus require needlessly duplicative and costly  
 11 discovery, including expert discovery, into *the fact* of damages and then  
 12 separately, months later, *the quantum* of damages.

13           Paramount Pictures’ proposal that Plaintiffs take damages discovery with  
 14 respect to their claim for breach of contract but not copyright infringement  
 15 would create a host of logistical issues. The task of parsing the narrow and  
 16 artificial distinction between the fact and quantum of damages and those which  
 17 are attributable to Paramount Pictures’ breach of contract but not its copyright  
 18 infringement is fraught with uncertainty, which would likely lead to *more*  
 19 discovery disputes between the parties, not fewer. Paramount Pictures cites  
 20 *Bassil v. Webster*, 2021 WL 1235258 (C.D. Cal. Jan. 15, 2021) and *Wixen Music*  
 21 *Publ’g, Inc. v. Triller, Inc.*, 2021 WL 4816627 (C.D. Cal. Aug. 11, 2021), but  
 22 those cases only involved a copyright infringement claim—of which “damages”  
 23 is not normally an element of liability—and are therefore unhelpful here.

24           Moreover, and in any event, the damages in this case are not prohibitively  
 25 changeful. Paramount Pictures cites the re-release of *Maverick* in theaters as  
 26 cause to bifurcate the case, but the article it references makes clear that the re-  
 27 release has already come and gone (Rebecca Rubin, ‘*Top Gun: Maverick*’  
 28 *Returns to Theaters for Limited Re-Release*, VARIETY (Nov. 29, 2022)

1 (“Paramount is re-releasing the blockbuster sequel on the big screen . . . from  
2 Dec. 2 through Dec. 15.”)) and that *Maverick* has already long been available for  
3 home-streaming, eliminating concerns of meaningful month-to-month changes  
4 during discovery. *Id.* Additionally, the parties have each proposed expert report  
5 deadlines in November 2023, and as such, bifurcation will have no bearing on  
6 whether experts might potentially amend their reports to account for revised  
7 revenue figures. Based on the foregoing, and for the sake of economy and  
8 efficiency, Plaintiffs respectfully request a non-bifurcated schedule.

9 **Paramount Pictures’ Proposal.**

10 As discussed *supra* at § C, Paramount Pictures requests that the Court  
11 bifurcate the liability and damages phases of discovery. Plaintiffs’ opposition to  
12 Paramount Pictures’ bifurcation proposal relies primarily on their breach of  
13 contract claim. As an initial matter, however, this is the proverbial tail wagging  
14 the dog. Indeed, Plaintiffs did not even add the breach of contract claim—  
15 limited to a narrow credit issue—until their first amended complaint. And,  
16 contrary to Plaintiffs’ unsupported claim, there is no overlap between the alleged  
17 copyright-infringement damages and the alleged breach of contract damages,  
18 with the latter limited to the claim that Yonay was entitled to a credit on  
19 *Maverick*. Put simply, the limited contract claim cannot justify expensive and  
20 complex discovery on Plaintiffs’ copyright infringement claim before liability is  
21 resolved on that claim. Moreover, while Plaintiffs correctly observe that they  
22 will need to prove damages to ultimately succeed on their claim, Plaintiffs  
23 ignore that Courts regularly decide liability on breach of contract claim on  
24 summary judgment without resolving the issue of damages—precisely as  
25 Paramount Pictures’ proposed schedule would permit. *See, e.g., Adler v. Solar*  
26 *Power, Inc.*, 2018 WL 1626162, at \*12 (S.D.N.Y. Mar. 30, 2018) (granting  
27 summary judgment on breach of contract claim on liability only and denying  
28 motion as to damages on such claim).



1 All that said, Paramount Pictures' concern is with the costly and complex  
2 discovery into damages on Plaintiffs' copyright infringement claim and thus  
3 does not oppose damages discovery on Plaintiffs' narrow breach of contract  
4 claim occurring concurrently with liability-based discovery on the copyright  
5 infringement and breach of contract claims, as long as damages-discovery on  
6 Plaintiffs' copyright infringement claim is deferred pending a ruling on liability  
7 on that claim. *See, e.g., Bassil*, 2021 WL 1235258, at \*2; *Wixen Music Publ'g.*,  
8 2021 WL 4816627, at \*3.

9 **d. Amended Pleadings**

10 At this stage in the litigation, the parties do not currently anticipate the  
11 need for amended pleadings, but reserve the right to amend or seek leave to  
12 amend as applicable.

13 **e. Rule 16 Orders**

14 The parties do not request that the Court issue any other orders under Rule  
15 26(c) or Rule 16(b)-(c) at this time.

16 **f. Motion Practice**

17 The parties expect to engage in dispositive motion practice, including  
18 motion(s) for summary judgment. The parties plan to file any such motion  
19 pursuant to the schedule set by the Court. The parties agree to provide at least  
20 fourteen (14) days for any opposition to any dispositive motion.

21 **I. Other Issues Affecting Case Status Or Management**

22 The parties do not foresee any other issues affecting the status or  
23 management of the case at this time.

1 Dated: December 23, 2022

Respectfully submitted,

2 **TOBEROFF & ASSOCIATES, P.C.**

3  
4 By: /s/ Marc Toberoff

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1 Pursuant to Local rule 5-4.3.4(a)(2)(i), the filer attests that all other  
2 signatories listed, and on whose behalf the filing is submitted, concur in the  
3 filing's content and have authorized the filing.

4  
5 Date: December 23, 2022

**TOBEROFF & ASSOCIATES, P.C.**

6 By: /s/ Marc Toberoff

7 Marc Toberoff

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